



Loudoun County, Virginia

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Department of Management and Financial Services

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**MEMORANDUM**

June 11, 2009

**TO:** Board of Supervisors

**FROM:** Mark Adams, Director, Department of Management and Financial Services  
Suzanne Lane, Debt Manager, Department of Management and Financial Services

**SUBJECT:** Volunteer Fire Companies

The purpose of this memorandum is to make you aware of a recent determination by the County's Bond Counsel, Nixon Peabody, regarding the status of the relationship between the County and its volunteer fire companies for IRS purposes, and a related request that the County is making of the volunteer fire companies.

On June 16, the County is due to close on a lease purchase transaction (funded by tax exempt bonds) with the Virginia Resources Authority for the purchase of apparatus for certain volunteer fire companies as well as the public safety communications system as adopted by the Board in the County's CIP.

Initially, the County sought to finance this equipment through VRA-issued tax exempt 501(c)(3) bonds. However in preparation for this financing, staff discovered that several of the County's volunteer fire companies have not completed the process of becoming 501(c)(3) organizations as was recommended by the Board-initiated financial audit of the companies two years ago.

The County's Bond Counsel advised that the only remaining option available to complete tax exempt financing of the equipment was if the volunteer fire companies qualified as instrumentalities of County Government under IRS guidelines.

At the County's request, Nixon Peabody researched this issue and sets forth in the attached letter their reasoning for determining that the companies do in fact qualify as instrumentalities and are therefore eligible to use equipment financed with tax exempt bonds.

As a condition of providing their required certification to the IRS that the entire financing transaction qualifies for tax exemption, Nixon Peabody is requiring that each volunteer fire company sign and return (before the transaction closing date of June 16) a form (also attached) certifying that the

Page 2

June 11, 2009

Memo: Board of Supervisors

volunteer fire companies will not sell, lease or allow any private individual (other than an individual receiving fire or rescue services) to benefit from the equipment (all of which is titled to the County Government).

Please call either of us if you have any concerns on this issue.

cc: Linda Neri, Interim County Administrator  
Jack Roberts, County Attorney  
John Sandy, County Administration  
Chief Joseph Pozzo, Fire, Rescue and Emergency Management

**CERTIFICATE OF** \_\_\_\_\_  
(Name of Company)

The undersigned officer of \_\_\_\_\_ (the "Company"), makes the following covenants, representations and certifications:

1. The Company is a "fire/EMS company" organized pursuant to Virginia Code § 27-8 (2004).
2. Loudoun County, Virginia (the "County") has advised the Company that, pursuant to the terms of a financing lease, the County is receiving funds from the Virginia Resources Authority (the "VRA") from the proceeds of the VRA's Infrastructure Revenue Bonds (Virginia Pooled Financing Program), Senior and Subordinate Series 2009A (Non-ACE) (the "Bonds").
3. The Company understands that the County is applying the funds from the Bonds to the purchase of a new public safety radio system, and new apparatus as approved by the Board of Supervisors in the Adopted Amended FY 2007 - FY 2012 Capital Improvement Program (the "Equipment"), a portion of which will be used by the Company to satisfy its fire and rescue needs and obligations.
4. The Company further understands that the interest on the Bonds is intended to be excluded from gross income for Federal income tax purposes, and that certain requirements regarding the use of the Equipment must be satisfied during the term of the Bonds in order for such exclusion to be applicable, including requirements applicable to the Company's use of the Equipment.
5. As more fully described below, the Company will not take any action with respect to the Equipment that would cause the interest on the Bonds to be includable in gross income for federal income tax purposes.
6. The Company reasonably expects to utilize the Equipment solely for its volunteer fire and rescue operations during the economic life of the Equipment. The Company does not reasonably expect to and will not take any of the following actions:
  - a. Sell any of the Equipment;
  - b. Lease any of the Equipment;
  - c. Enter into a contract for the management, service or operation of any of the Equipment; or
  - d. Allow any person (other than the County or another volunteer fire company that is chartered by the Loudoun County Board of Supervisors) to receive any benefits from the Equipment, excluding any person who receives fire or rescue services from the Company.

Date: June \_\_, 2009

\_\_\_\_\_  
(Name of Company)

By: \_\_\_\_\_  
Name:

Title:

**NIXON PEABODY<sup>LLP</sup>**  
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June 9, 2009

Mark Adams  
Director of Management and Financial Services  
Loudoun County, Virginia  
One Harrison Street, S.E.  
4th Floor  
Leesburg, Virginia 20175

Re: Status of Volunteer Fire and Rescue Companies as Instrumentalities

Dear Mr. Adams:

You asked that we determine whether the 17 volunteer fire and rescue companies (the "Companies") that operate within Loudoun County, Virginia (the "County") are properly treated as "instrumentalities" of the County, as such term is used in Section 1.141-1(b) of the Income Tax Regulations. The Companies are listed in Appendix A to this letter. This determination relates to whether the Companies may use property financed with bonds the interest on which is excludable from gross income under Section 103 of the Internal Revenue Code of 1986 (the "Code"). With limited exceptions, entities that are neither governmental units nor instrumentalities of such units may not use bond-financed property without adversely affecting the exclusion from gross income of interest on such bonds.

The determination of whether an entity is an instrumentality of a governmental unit is determined by reference to certain factors set forth in Revenue Ruling 57-128, 1957-1 C.B. 311. In particular, Revenue Ruling 57-128 sets forth the following factors to be taken into account in determining whether an entity is an instrumentality of one or more governmental units:

- Whether it is used for a governmental purpose and performs a governmental function;
- Whether performance of its function is on behalf of one or more states or political subdivisions;
- Whether there are any private interests involved, or whether the states or political subdivisions involved have the powers and interests of an owner;
- Whether control and supervision of the organization is vested in public authority or authorities;

- If express or implied statutory or other authority is necessary for the creation and/or use of such an instrumentality, and whether such authority exists; and
- The degree of financial autonomy and the source of its operating expenses.

Each of these factors is discussed below based on information provided to us by the County.

1. Is the organization used for a governmental purpose and does it perform a governmental function? No Virginia statute requires that a county in Virginia provide fire protection services for its residents;<sup>1</sup> however, the relationship between a Virginia locality's police power interests and the provision of fire and rescue services is well established in Virginia law.<sup>2</sup> The County's interest in the provision and administration of fire and rescue services is evidenced by the Fire and Rescue Commission Charter, adopted by the County Board of Supervisors on May 20, 2002, which states that "the Board is committed to providing Loudoun citizens with competent, effective and efficient fire, rescue and emergency medical services."<sup>3</sup> The services are provided through the County's Department of Fire and Rescue Services and the Companies.

2. Is the performance of the organization's function on behalf of one or more states or political subdivisions? As noted above, the County has determined to provide fire and rescue services to its citizens pursuant to Va. Code Ann. § 27-6.1 (2004). Moreover, the County Board of Supervisors is required to approve the creation of any volunteer fire-fighting or emergency medical services organization pursuant to Va. Code Ann. § 27-8.1 (2004). Therefore, the Companies are providing services on behalf of the County.

3. Are any private interests involved, or do the states or political subdivisions involved have the powers and interests of an owner? The Companies are all incorporated as non-stock Virginia corporations and, thus, there are no privately held interests. Of the 17 Companies, 15 are organized under Sections 501(c)(3) and 501(c)(4) of the Code. These Code sections provide that no earnings may inure for the benefit of any private shareholder or individual. Of the remaining two Companies, one is described in Section 501(c)(8) and the other is a non-stock corporation.

The County has many powers and interests of an owner as evidenced by the following:

- a. The County can dissolve a Company for any reason.<sup>4</sup>

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<sup>1</sup> Att'y Gen. Ann. Rep. 1985-1986 at 173; 1984-1985 at 137.

<sup>2</sup> See Att'y Gen. Ann. Rep.: 1985-1986 at 173 (the organization and operation of a fire department is a governmental function); 1959-1960 at 94 (fighting of fires bears a direct relation to the safety, health and general welfare of the people); *Richmond v. Warehouse Corp.*, 148 Va. 60, 70, 138 S.E. 503 (1927) (if a locality chooses to provide fire protection services, the organization and operation of a fire department is a governmental function).

<sup>3</sup> See also Service Plan of the Loudoun County Fire and Rescue System adopted by the Board of Supervisors on December 5, 2005.

<sup>4</sup> Va. Code Ann. § 27-10 (2004).

b. The County appropriates public funds to the Companies as determined by the County, and such funds represent a significant portion of the operating funds of the Companies.

c. The County has the right, at its discretion, to examine and inspect a Company's books and records relating to funds appropriated to them.

d. Apparatus and buildings fully paid for by the County revert back to the County at the end of its useful life. Moreover, most new assets are financed by the County.

4. Is control and supervision of the organization vested in public authority or authorities? As mentioned above, the County Board of Supervisors is required to approve the creation of any volunteer fire-fighting or emergency medical services organization pursuant to Va. Code Ann. § 27-8.1 (2004). In addition, the chief of the County Department of Fire and Rescue (the "Chief") has overall operational authority over the department, and manages system-wide day-to-day operations. The County also has created the Fire and Rescue Commission (the "Commission"). The voting members of the Commission are the Chief, three fire volunteers, and three rescue volunteers. The County's Operational Medical Director ("OMD") and a member of the Board of Supervisors serve as non-voting members of the Commission. All members of the board are appointed by the Board of Supervisors and may be removed by the Board of Supervisors. The Commission has established an initial, hierarchical framework for the development and distribution of system administrative and operational policies and guidelines. The Commission's principal decisions are documented as Fire and Rescue Guidelines ("FRG's"). Operational medical policies and protocols are documented by the OMD as a part of this structure. These policies apply to the Companies, which are bound by the Commission policies and the failure to follow the policies could result in a Company risking its public funding, or potentially the Company could be dissolved by the County Board of Supervisors. Moreover, in the case of individuals who have violated policies, the Chief, the Commission and the chairman of the Commission can relieve such individuals from duty. This authority has been exercised in the past. Although the chief of each Company is a volunteer, the Companies are subject to control by the Commission and the Chief, and as discussed below, significant portions of the operational needs at the Companies' facilities are satisfied by employees of the County.

5. Is express or implied statutory or other authority necessary for the creation and/or use of such an instrumentality, and does such authority exist? Va. Code Ann. § 27-8 (2004) provides for who may create a fire and rescue company and Va. Code Ann. § 27-8.1 (2004) provides that such organization must be approved by the governing body of the County. Moreover, Va. Code Ann. § 27-23.6 (2004) provides that "[a]ny county, city or town may provide fire-fighting and emergency medical services to its citizens using both government-employed and volunteer company or association firefighters and emergency medical services personnel. If such a system is utilized, the volunteer fire-fighting and emergency medical services companies and associations shall be deemed an instrumentality of the county, city or town." While a state law characterization will not control for federal tax purposes, the treatment of the Companies as instrumentalities for Federal tax purposes would result in consistent treatment with Virginia law.

6. What is the degree of financial autonomy and the source of the organization's operating expenses? The County annually appropriates funds to the various Companies. A

significant portion of the operating budget for each Company is funded by the County, with a current range of support of cash funding provided by the County of approximately 33 percent to 97 percent, with a current average amount of support in excess of 60 percent. In addition, all but one of the Companies' facilities are staffed partially by County employees, and in the case of two of the Companies, staffing by County employees is present at all times. Importantly, the reason for the County staffing of the facilities was based on a request of the Companies. Taking into account the cost of this staffing as an in-kind contribution to the operating costs of the Companies, the current range of support of operating costs provided by the County is approximately 61 percent to 99 percent, with a current average amount of support in excess of 84 percent. Taking these in-kind contributions is appropriate, as the Companies' facilities could not operate without the staffing provided by the County. This type of in-kind contribution was taken into account in Private Letter Ruling 200702019 (Sept. 27, 2006) as a source of operating expenses where the Internal Revenue Service ruled favorably on a question of whether an entity qualified as an instrumentality of a governmental person. The County also provides indirect funding of the Companies through the following services: physical examinations, training and certification, tuition reimbursement, health insurance eligibility, workers compensation, death and disability benefits, retirement benefits, communications systems, personal property tax exemption. In addition, the County provides funding of capital improvements for the Companies. None of these contributions are reflected in the percentages listed above. Finally, the County has the right to review the Companies' books and records with respect to the funds provided by the County, and retains the right to withhold funds from the Companies if they do not comply with the FRGs.

Based on the foregoing, the Companies will be treated as instrumentalities of the County for Federal income tax purposes.

This letter is based on the law and facts as they currently exist. Any proposed changes to the relationship between the Companies and the County should be reviewed to determine whether such changes would adversely affect the conclusion stated above. We would also recommend that we periodically review of the levels of operating support given to the Companies from the County to ensure it is consistent with the facts as they currently exist.

Sincerely yours,



Bruce M. Serchuk

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To ensure compliance with IRS requirements, we inform you that any tax advice contained in this communication is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or matter addressed herein.